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PP

v.

HII LAM KING

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HIGH COURT SABAH &amp; SARAWAK, SIBU

LINTON ALBERT J

[CRIMINAL TRIAL NO: 47-1-2004]

16 FEBRUARY 2007

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**CRIMINAL LAW:** Prosecution - Close of prosecution - Prima facie case - Murder - Sufficiency of proof - No material facts proven linking accused to offence - Accused acquitted without having to enter his defence - Penal Code s. 302

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**EVIDENCE:** Hearsay - Statement by person not called - Admissibility dependent on condition precedent in s. 32(1) of the Evidence Act 1950 - Maker cannot be found - Whether diligent search and reasonable exertion were made to procure witness's attendance - Unsuccessful casual attempts by police to locate and produce three witnesses - Robot-like methods adopted by police in attempting to locate witnesses and procure their attendance - Prosecution's application to admit statements disallowed

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The accused was charged for an offence under s. 302 of the Penal Code. He was accused of having committed murder by causing the death of one Ha Jong Jua. The accused together with seven others still at large were claimed to have brutally attacked the deceased with a stainless steel rod. The accused was seen and identified as one of the attackers who hit the deceased with a stainless steel rod. The accused was also one of the attackers who was seen carrying the deceased's body away from the scene of the crime. The cause of death was head injuries inflicted by a blunt object. There was, however, not a shred of evidence connecting the accused to the alleged offence. None of the witnesses called by the prosecution saw the alleged attack. What little there was that could be squeezed out of the identification parades conducted during the course of the investigation was merely the positive identification of the accused as a suspect by witnesses who were not called to testify. The prosecution had sought to admit the statements made under s. 112 Criminal Procedure Code by three witnesses who could not be called, under s. 32 of the Evidence Act 1950. PW15 who was attached to the Prosecution Section of the Police Headquarters, Sibul, had made unsuccessful casual attempts to locate and produce these three witnesses.

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**Held (acquitting and discharging the accused):****A**

(1) The robot-like methods adopted by the police in attempting to locate the witnesses and procure their attendance failed to meet the rigours expected of them. In the circumstances the court disallowed the application of the prosecution to admit the statements of the three witnesses. (para 10)

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(2) Bereft of material facts linking the accused to the offence, to wit, the attack by the accused and seven other men, which led to the deceased sustaining the fatal injury, the prosecution's case collapsed because it had failed to establish an essential ingredient of the offence. In the circumstances, pursuant to s. 180(2) of the CPC the court had no option but to acquit the accused without having to call upon him to enter his defence. (paras 10 & 11)

**C****Case(s) referred to:**

*Balachandran v. PP* [2005] 1 CLJ 85 FC (*refd*)

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*PP v. Lam Peng Hoa & Anor* [1996] 3 CLJ 747 HC (*refd*)

*PP v. Mohamed Said* [1984] 1 MLJ 50 (*refd*)

**Legislation referred to:**

Criminal Procedure Code, ss. 112, 180(2), 180

Evidence Act 1950, s. 32

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Penal Code, s. 302

*For the prosecution - Ahmad Zubir Jantan; DPP*

*For the accused - Orlando Chua; M/s Wong, Orlando Chua & Kuok*

*Reported by Amutha Suppayah*

**F****JUDGMENT****Linton Albert J:****G**

[1] The accused, Hii Lam King was charged for an offence under s. 302 of the Penal Code, which carries the mandatory death sentence upon conviction. The charge read as follows:

That you, together with 7 others who are still at large, on the 6th day of February 2004, at about 10.00p.m. at the five foot-way of Chieng Siang Leu Restaurant, Pusat Tanahwang, Pedada Road, Sibu, in the State of Sarawak, in furtherance of the common intention of you all committed murder by causing death of Ha Jong Jua (m) (KPT: 630515-13-5139) and you have thereby committed an offence punishable under section 302 of the Penal Code read with section 34 of the same code.

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A [2] The prosecution called 19 witnesses to establish its case. The  
accused together with seven others still at large brutally attacked the  
deceased Ha Jong Hua with a stainless steel rod. Prior to the attack  
the deceased was sitting alone at the ground floor of Chieng Siang Leu  
Restaurant, Pusat Tanahwang, Pedada, Sibul, when an argument broke  
B out. Each of the attackers was armed with a stainless steel rod. The  
accused was seen and identified as one of the attackers who hit the  
deceased with a stainless steel rod. The accused was also one of the  
attackers who was seen carrying the deceased's body away from the  
scene of the crime and subsequently found dumped in the middle of the  
feeder road at Sungai Igan, Engkalat, Sibul, about 20 minutes' drive  
C away. The cause of death was head injuries inflicted by a blunt object.

[3] The evidence of PW1 to PW7 had established the identity of the  
deceased, that he was already dead when he was discovered at Engkalat  
and there were visible signs of wounds on various parts of his anatomy.  
D There was, however, not a shred of evidence connecting the accused to  
the alleged offence. None of the witnesses called by the prosecution saw  
the alleged attack. What little there was that could be squeezed out of  
the identification parades conducted during the course of the investigation  
was merely the positive identification of the accused as a suspect by  
E witnesses who were not called to testify.

[4] Section 180 of the Criminal Procedure Code as amended in 1997  
provides as follows:

- F (i) When the case for the prosecution is concluded, the court shall  
consider whether the prosecution has made out a *prima facie* case  
against the accused.
- (ii) If the court finds that the prosecution has not made out a *prima*  
*facie* case against the accused, the court shall record an order of  
acquittal.
- G (iii) If the court finds that a *prima facie* case has been made out against  
the accused on the offence charged the court shall call upon the  
accused to enter on his defence.

H [5] What that means is explained in *Balachandran v. PP* [2005] 1 CLJ  
85 where Augustine Paul, JCA (as he then was) delivering the judgment  
of the Federal Court said at p. 100:

I The result is that the force of the evidence adduced must be such that,  
if unrebutted, it is sufficient to induce the court to believe in the  
existence of the facts stated in the charge or to consider its existence  
so probable that a prudent man ought to act upon the supposition that  
those facts exist or did happen. On the other hand if a *prima facie* case

has not been made out it means that there is no material evidence which can be believed in the sense as described earlier. In order to make a finding either way the court must, at the close of the case for the prosecution, undertake a positive evaluation of the credibility and reliability of all the evidence adduced so as to determine whether the elements of the offence have been established ... .

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[6] The prosecution had sought to admit the statements made under s. 112 CPC by three witnesses who could not be called, under s. 32 of the Evidence Act 1950. They were Lau Lee Hung, Lin Lien Hui and Ling Kwong Kieng. In respect of Lau Lee Hung, PW15, Agas ak. Uding who was attached to the prosecution section of the Police Headquarters, Sibü, testified that he went to a house at No. 39B, Jalan Tong Sang to serve a subpoena on him for his attendance at the trial. He was met at the house by a male and female occupant but Lau Lee Hung was not there. The occupants did not know the whereabouts of Lau Lee Hung nor his telephone number. As for Lin Lien Hui four unsuccessful attempts were made to serve the subpoena on him at the same address at No. 2A, Lorong 16, Rejang Park, Sibü. Each time Lin Lien Hui was not at the address. The attempts were made on 5 May 2006 and 8 May 2005, 28 December 2006 and 30 November 2006. Each of those attempts was made casually, simply by going to the address and when the witness was not found at that address, nothing more was done to locate him. On that basis, learned DPP submitted that the two witnesses could not be found. The other witness, Ling Kwong Kieng could, however, be found, nevertheless it was alleged that he was not cooperative and adamant in not coming to court to testify. It was contended that his attendance in court could not be procured without an amount of delay, which under the circumstances appeared to be unreasonable.

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[7] Section 32 of the Evidence Act 1950 provides:

- (1) Statements, written or verbal, of relevant facts made by a person who is dead or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which under the circumstances of the case appears to the court unreasonable, are themselves relevant facts in the following case ... .
  - (i) when the statement was made in the course of, or for the purposes of, an investigation or inquiry into an offence under or by virtue of any written law.

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- A [8] The principles to be applied where it is sought to admit hearsay evidence under s. 32 of the Evidence Act 1950 was laid down in *PP v. Mohamed Said* [1984] 1 MLJ 50 at p. 51:

- B If a particular witness is material to the prosecution's case, it is the duty of the police to keep track of his whereabouts and take all precautionary measures that they be informed of any change of address. Under s. 34(ii) of the CPC, the responsibility of serving summonses or subpoenas on the accused persons and witnesses is with police officers, unless the court otherwise directs. If a particular witness is very material to the prosecution's case, it stands to reason
- C that the police must exercise extra diligence in applying for summonses early and in taking all necessary steps to ensure that the correct address of the witness has been obtained, bearing in mind the unreliability nowadays of the addresses given on identity cards. The correct addresses of the material witnesses should be obtained at the first opportunity and, if necessary, the police can invoke ss. 111 and
- D 112 of the CPC at the investigation stage. Section 111 of the CPC empowers the police to require their attendance at the police station so that they can be questioned under s. 112 of the CPC. If they do not attend, then under sub-s. (ii) of s. 111, they may be compelled to attend by a magistrate (see *Chong Fook Kam & Anor v. Shaaban & Ors.* [1968] 2 MLJ 50 at page 54). Where the person to be summoned cannot by the exercise of due diligence be found, then under s. 35(iv)
- E of the CPC, the summons may be served by leaving a copy thereof for him with some adult member of his family or with his servant residing with him. If service under s. 35(iv) of the CPC cannot be effected, then the prosecution should invoke s. 36 of the CPC, by affixing a copy of the summons to some conspicuous part of the house
- F or other place in which the person summoned ordinarily resides, if so directed by the court. When a witness fails to appear in court after being served under ss. 35 or 36 of the CPC, the prosecution is then entitled to apply for warrant of arrest under s. 47 of the CPC. In the present case, it would appear that none of these powers given by the CPC to compel the appearances of the two material witnesses had
- G been exhausted by the police, either in the first or second prosecution.

[9] In *PP v. Lam Peng Hoa & Anor* [1996] 3 CLJ 747 at p. 756, Kang Swee Gee, J said:

- H The requirements proposed in *PP v. Mohamed Said* [1984] 1 MLJ 50 may appear stringent and cumbersome; but these are prescribed avenues under the CPC which the prosecution must go through to trace as witness, without which the court may not be able to act to admit a statement under s. 32 of the Evidence Act.
- I The same considerations would apply to the other conditions precedent. Unless it is proved to the satisfaction of the court that they had employed due diligence and reasonable exertion to attempt to

locate the witness and were able to assess the chances of the success of procuring her, there could be no basis to find that she could not be procured without an amount of delay or expense. Accordingly, I had to refuse the prosecution's application.

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[10] It is patently clear that the half-baked approach taken to procure the attendance of these witnesses fall far short of the requirements set out in the authorities cited. For example, the casual attitude of PW19, the investigating officer who testified that he had written to the media and publish the names of the witnesses to procure their attendance but did not bother to ascertain whether there was any publication in the media. The robot-like methods adopted by the police in attempting to locate the witnesses and procure their attendance failed to meet the rigours expected of them as laid down in the authorities cited. In the circumstances I disallowed the application of the prosecution to admit the statements of these three witnesses. Bereft of material facts linking the accused to the offence, to wit, the attack by the accused and seven other men, which led to the deceased sustaining the fatal injury, the prosecution's case collapsed because it had failed to establish an essential ingredient of the offence.

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[11] In the circumstances, pursuant to s. 180(2) of the CPC the court has no option but to acquit the accused without having to call upon him to enter his defence. The accused is hereby acquitted and discharged. All exhibits shall be kept in police custody pending the expiry of the appeal period. Order accordingly.

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